INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Argument	6
Conclusion	12
Appendix	13

CITATIONS

Cases:

Alexander v. *Hillman*, 296 U. S. 222	12
Arnson v. *Murphy*, 115 U. S. 579	7, 8
Bienville Water Supply Co. v. *Mobile*, 186 U. S. 212	12
Bowit Teller & Co. v. *United States*, 283 U. S. 258	7, 10
Booth v. *Fletcher*, 101 F. (2d) 676	12
Brampton Woolen Co. v. *Field*, 55 F. (2d) 325	8
Cheatham v. *United States*, 92 U. S. 85	7
Commissioners of the Sinking Fund of Louisville v. *Buckner*, 48 Fed. 533	8
David, A., Co. v. *Grissom*, 64 F. (2d) 279	7
Dimmick v. *Tompkins*, 194 U. S. 540	12
Finn v. *United States*, 123 U. S. 227	7
First Nat. Bank of Beaver Falls v. *United States*, 8 F. Supp. 484, new trial denied, 9 F. Supp. 424, certiorari denied, 294 U. S. 717	9
Fort Scott v. *Hickman*, 112 U. S. 150	8
Gans S. S. Line v. *United States*, 105 F. (2d) 955, certiorari denied, 308 U. S. 613	9, 10, 11
Graham & Foster v. *Goodcell*, 282 U. S. 409	10
Jelke, John F., Co. v. *Smietanka*, 86 F. (2d) 470, certiorari denied, 300 U. S. 669	9, 10, 11
Kelly v. *Johnston*, 111 F. (2d) 613	12
Kithcart v. *Metropolitan Life Ins. Co.*, 88 F. (2d) 407	12
Lowe Bros. Co. v. *United States*, 304 U. S. 302	10
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373	7
National Fire Ins. Co. v. *Thompson*, 281 U. S. 331	12
Pacific Mills v. *Nichols*, 72 F. (2d) 103	7
Pierce Oil Corp. v. *City of Hope*, 248 U. S. 498	12
Public Service Ry. Co. v. *Herold*, 229 Fed. 902	8
Rand v. *United States*, 249 U. S. 503	7

Cases—Continued. Page

Retzer v. *Wood*, 109 U. S. 185 8
Routzahn v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied, 287 U. S. 650 ..... 4, 5
Royal Indemnity Co. v. *United States*, 313 U. S. 289 8
Savings Institution v. *Blair*, 116 U. S. 200 7
Southern Pac. R. Co. v. *Groeck*, 68 Fed. 609 12
Stearns Co. v. *United States*, 291 U. S. 54 5
Toledo Edison Co. v. *McMaken*, 103 F. (2d) 72, certiorari denied, *sub. nom. Toledo Railways & Light Co.* v. *McMaken*, 308 U. S. 569 8
United States v. *Bertelsen & Petersen Co.*, 306 U. S. 276 .. 9, 10, 11
United States v. *Chicago Golf Club*, 84 F. (2d) 914 7
United States v. *Felt & Tarrant Co.*, 283 U. S. 269 7
United States v. *Michel*, 282 U. S. 656 ..... 9, 14
United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573, rehearing denied, 301 U. S. 713 .. 5, 6, 9, 10
United States v. *Savings Bank*, 104 U. S. 728 ..... 6, 10
United States v. *Swift & Co.*, 282 U. S. 468 ..... 6, 10

Statutes:
Internal Revenue Code, Sec. 3313 (U. S. C., Supp. V., Title 26, Sec. 3313) 15
Judicial Code, Sec. 145 (U. S. C., Title 28, Sec. 250) 16
Revenue Act of 1921, 42 Stat. 227, Sec. 252 ..... 15, 16
Revenue Act of 1924, 43 Stat. 253, Sec. 281 16
Revenue Act of 1926, 44 Stat. 9, Sec. 284 16
Revised Statutes, as amended:
Sec. 3226 (U. S. C., Title 26, Secs. 1672–1673) 6, 13
Sec. 3228 (U. S. C., Title 26, Sec. 1433) 14

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 636

A. G. REEVES STEEL CONSTRUCTION COMPANY, A CORPORATION, PETITIONER

v.

ELIZABETH WEISS, EXECUTRIX OF HARRY H. WEISS, FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 25–26) is not officially reported. The opinion of the circuit court of appeals (R. 30–37) is reported at 119 F. (2d) 472.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1941 (R. 29). A petition for rehearing was denied June 25, 1941 (R. 41). The petition for a writ of certiorari was filed September 22, 1941. The jurisdiction of this Court is invoked

under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A portion of taxes paid by petitioner for the years 1918 and 1919 were in 1924 credited to taxes for the year 1917, although collection of the 1917 taxes was then barred by the statute of limitations. In 1937 petitioner brought this suit against the executrix of the Collector of Internal Revenue who collected the 1918 and 1919 taxes, asking refund of the 1918 and 1919 taxes overpaid. The questions presented are:

1. Whether the defense of the statute of limitations may be raised by the Collector even though not specially pleaded.

2. Whether the action of the Commissioner, in 1924, crediting the overpaid taxes for 1918 and 1919 to 1917 taxes, constitutes a disallowance of petitioner's claims for refund of its 1918 and 1919 taxes so as to start the running of the two-year period of limitations.[1]

3. Whether it was proper for the district court and the circuit court of appeals to examine their own records in the two previous tax cases of this taxpayer, brought for recovery of the same sums, and to notice judicially the established and uncontroverted facts in these cases.

---

[1] Although petitioner limits the questions presented to the first and third (Pet. 3–4), petitioner discusses the second question at length (Pet. 2, 4, 8–9, 10–11).

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 13–16.

STATEMENT

The allegations of taxpayer's petition, filed in the district court (R. 4–23), may be summarized as follows:

In 1919 and 1920, taxpayer paid income and profits taxes in certain amounts for the years 1918 and 1919 respectively (R. 5, 6). In 1922 and 1923, taxpayer filed claims for refunds of a portion of these taxes (R. 5, 6), and by letter dated February 2, 1924, the Commissioner of Internal Revenue notified taxpayer of its overpayment of $54,841.40 for 1918, and of $34,764.26 for 1919 (R. 6, 7). The net income, invested capital and tax set forth in the Commissioner's letter were the true net income, invested capital and tax of the taxpayer for the years 1918 and 1919 (R. 7). Although the Commissioner allowed taxpayer's claims for refund for $54,841.40 and $34,764.26 for the years 1918 and 1919 respectively (R. 6, 7), no part of these allowed payments were ever refunded to taxpayer (R. 5, 6).

Taxpayer by its petition in the trial court disclaimed (R. 7) that it was suing on an account stated, but alleged that it brought its action under the Internal Revenue laws for money had and received by defendant's intestate in excess (by the respective sums of $54,841.40 and $34,764.26) of

the tax properly due for the years 1918 and 1919, with interest thereon as allowed by law.

Respondent filed a motion to dismiss taxpayer's petition upon the grounds: (1) that the district court had no jurisdiction; and (2) that the petition failed to state a cause of action (R. 24).

The district court granted the respondent's motion, upon the ground that taxpayer's several claims for refund had been disallowed by the Commissioner in 1924, and that taxpayer's action filed in March 1937, was therefore barred by Section 3226, Revised Statutes. The circuit court of appeals affirmed the decision of the district court (R. 29).

The exhibit relating to the notice of "overpayment" (R. 7, 9–23) attached to the pleadings shows only a determination by the Commissioner of overassessment (R. 16, 23). The district court and the circuit court of appeals, however, had before them certain established and uncontroverted facts regarding taxpayer's tax liability for the years 1918 and 1919. These facts were disclosed by the records of two previous suits which taxpayer had filed in the same district court and which it had appealed to the court below. In these earlier cases, taxpayer had sued for refund of 1917 taxes collected from it by credits from the years 1918 and 1919. Those pertinent additional facts appear in the opinion of the court below in the two earlier cases, i. e., *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied, 287 U. S. 650, and

United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573, rehearing denied, 301 U. S. 713, and in the records in those cases. Those established and uncontroverted facts are as follows:

Taxpayer "overpaid its 1918 and 1919 taxes in the sum of $26,453.87 and $34,764.26, respectively" (*Routzahn* v. *Reeves Bros. Co.*, p. 916), and on May 6, 1924, the Commissioner of Internal Revenue authorized the disbursing clerk of the Treasury Department to apply the overpayments for 1918 and 1919 to the tax for 1917 (*United States* v. *Reeves Bros. Co., supra,* p. 121). This latter means that the Commissioner signed the schedule of refunds and credits May 6, 1924.[2] Cf. *Stearns*

---

[2] According to the stipulation (R. 8, 10, 11, 12, 13) in case No. 272, October Term, 1936, this Court (*United States* v. *Reeves Bros. Co., supra*), the Commissioner assessed additional taxes for 1917 against the taxpayer on March 29, 1924, and on May 6, 1924, credited $26,453.87 of the overpayment for 1918 and the entire $34,764.26 overpaid for 1919 against the 1917 tax assessed. (Apparently, $28,387.53 of taxpayer's total overpayment for 1917 was credited on May 6, 1924, in satisfaction of taxes in that amount assessed against taxpayer for other years. (R. 86, case No. 272, October Term, 1936)). By later adjustment, however, set forth in paragraph 12 of the stipulation (R. 9, No. 272, October Term, 1936), *all overpayments for 1918 and 1919 "were refunded to plaintiff, except* * * * those of $26,453.87 [overpaid for 1918] and $34,764.26 [overpaid for 1919] * * * which were credited against unpaid taxes for 1917 * * *." The record in case No. 398, October Term, 1932, this Court (*Routzahn* v. *Reeves Bros. Co., supra*), contains the same stipulation (R. 10). It thus appears that taxpayer seeks to recover the full amount of the overpayments even though in fact some have already been refunded.

Co. v. *United States*, 291 U. S. 54, 58; *United States* v. *Swift & Co.*, 282 U. S. 468, 475–476. On May 6, 1924, the collection of the 1917 tax was barred. *United States* v. *Reeves Bros. Co., supra*, p. 121.

ARGUMENT

Taxpayer filed its present suit for the recovery of internal revenue taxes more than 16 years after payment of the taxes and more than 12 years after the Commissioner took action upon that part of the claims for refunds to which the suit allegedly relates. We submit that the court below was correct in holding that the suit is barred by Revised Statutes, Section 3226, as amended (Appendix, *infra*) which provides, *inter alia*, that no suit shall be maintained in any court for the recovery of any revenue tax after the expiration of five years from the date of payment of the tax unless within two years after the disallowance of the part of the claim to which the suit relates.[3]

---

[3] Taxpayer disclaims (R. 7) that it is suing on an account stated. We have accordingly here directed our attention to the suit as one for recovery of taxes overpaid and unrefunded, which, we contend, is barred as not timely. But we believe, and if the Court grants taxpayer's petition for a writ of certiorari we shall urge, that in substance the instant suit is on an alleged account stated. Taxpayer sues on the Commissioner's "allowance" and thus acquiesces and relies on it. We submit that it cannot on the one hand rely and sue on the Commissioner's letter of February 2, 1924, as a correct statement of its account with the Government, and on the other hand effectively disclaim that its suit is not on an account stated theory. Such a suit, moreover, will lie only against the United States, and since the amount sued for exceeds $10,000, in the Court of Claims. *United States* v. *Savings*

1. Taxpayer contends that respondent cannot rely on Section 3226 because respondent did not specially plead the section as a statute of limitations. In a suit against the United States, the defendant is not required to plead plaintiff's non-compliance with Section 3226. *Finn* v. *United States,* 123 U. S. 227, 232–233; *Cheatham* v. *United States,* 92 U. S. 85, 88–89; *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7). And in a suit against the Collector, compliance with the first part of Section 3226, requiring that a claim for refund precede the suit, must be pleaded and proved by the taxpayer. *Savings Institution* v. *Blair,* 116 U. S. 200, 206; *Pacific Mills* v. *Nichols,* 72 F. (2d) 103, 105 (C. C. A. 1); *A. David Co.* v. *Grissom,* 64 F. (2d) 279, 281 (C. C. A. 4). No reason appears for making a distinction between the various provisions of section 3226 in this respect. This Court has stated that compliance with all the conditions imposed by the statute must be affirmatively shown before a suit could be maintained against a collector. *Arnson* v. *Murphy,* 115 U. S. 579, 584, 586. See also *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 270, 273; *Rand* v. *United States,* 249 U. S. 503, 510. Cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. This has been the result reached by the lower courts. *John F. Jelke Co.* v. *Smietanka,* 86 F. (2d) 470, 471–472

Bank, 104 U. S. 728, 734; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265.

(C. C. A. 7), certiorari denied, 300 U. S. 669; *Commissioners of the Sinking Fund of Louisville* v. *Buckner,* 48 Fed. 533, 535 (C. C. Ky.); *Public Service Ry. Co.* v. *Herold,* 229 Fed. 902 (C. C. A. 3). Cf. *Brampton Woolen Co.* v. *Field,* 55 F. (2d) 325, 328 (D. N. H.).

Petitioner relies upon *Retzer* v. *Wood,* 109 U. S. 185, and upon *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72 (C. C. A. 6), certiorari denied, *sub. nom. Toledo Railways & Light Co.* v. *McMaken,* 308 U. S. 569. *Retzer* v. *Wood,* however, is plainly in conflict with the later decision of *Arnson* v. *Murphy,*[4] 109 U. S. 238, s. c., 115 U. S. 579, while the *Toledo Edison* case does not support taxpayer's argument.[5]

2. Taxpayer contends that its claim for refund was not disallowed, but that on the contrary it was expressly allowed (R. 6, 7; Pet. 8–9) and that,

---

[4] The *Retzer* case has since been cited only in the contemporaneous case of *Fort Scott* v. *Hickman,* 112 U. S. 150, 165, on another point, while the *Arnson* case has been repeatedly cited with approval, and the rule announced therein has become the settled and prevailing one with respect to the prosecution of claims for the recovery of both customs duties and internal revenue taxes, and this whether the suit be against the United States or the collector.

[5] The same circuit court of appeals which decided this case decided the *Toledo Edison* case. The latter case holds only that where a personal judgment against the collector would be converted (by issuance of a certificate of probable cause) into a judgment which is in effect one against the Government, the collector is without power to waive as against the Government the statutory bar. Cf. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289.

therefore, it could bring the instant suit at any time. But the claim was, in fact, partially disallowed.[6] On May 6, 1924, the Commissioner directed the disbursing clerk of the Treasury Department to apply the unrefunded overpayments for 1918 and 1919 to the tax for the year 1917 (*United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6)). Thus on that date, as the petitioner expressly conceded in the court below,[7] the Commissioner signed the schedule of refunds and credits.

This credit of the unrefunded 1918 and 1919 taxes to the 1917 tax may be regarded as constituting a refusal by the Commissioner to pay back to taxpayer its 1918 and 1919 overpayments, and, therefore, as a disallowance of taxpayer's claims for refund for 1918 and 1919.[8] *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276, 279–280; *Gans S. S. Line* v. *United States*, 105 F. (2d) 955 (C. C. A. 2), certiorari denied, 308 U. S. 613; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470, 473 (C. C. A. 7), certiorari denied, 300 U. S. 669; *First Nat. Bank of Beaver Falls* v. *United States*, 8 F. Supp. 484, motion for new trial denied, 9 F. Supp. 424 (C. Cls.), certiorari denied, 294 U. S. 717. Since

[6] The remainder was in fact refunded. See *supra*, footnote 2. No notice of the disallowance was necessary at that time. *United States* v. *Michel*, 282 U. S. 656.

[7] See page 4 of the taxpayer's petition for rehearing: "Not until May 6th did the Commissioner sign the schedule making the credit in the case at bar."

[8] A second view regards the credit of the 1918 and 1919 overpayments to the assessed 1917 tax as a *pro tanto* collec-

the instant suit is to recover the overpayment of the 1918 and 1919 taxes, taxpayer must fail under the uniform holding of these cases that the Commissioner's credit of an overpayment of one year in satisfaction of a barred tax for another constitutes a rejection of the claim for refund of the year originally overpaid.[9] And since the claim has thus been rejected, the present action, brought more than two years after the rejection, is barred under Section 3226 of the Revised Statutes. *Gans S. S. Line* v. *United States, supra,* pp. 956–957; *John F. Jelke Co.* v. *Smietanka, supra,* p. 473.

In any event, however the Commissioner's action be termed, it is clear, and taxpayer does not apparently dispute, that certainly not later than May 6, 1924, final administrative action had been taken

---

tion of the 1917 tax. If this view is to be accepted, however, the taxpayer must fail without regard to time limitations, since he must file a claim for refund of the 1917 taxes thus collected, and sue for recovery of the 1917 taxes. *United States* v. *Swift & Co.*, 282 U. S. 468; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 424; *United States* v. *Savings Bank*, 104 U. S. 728, 734; *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, 122 (C. C. A. 6), certiorari denied, 299 U. S. 573, rehearing denied, 301 U. S. 713. And such action lies only against the United States and in the Court of Claims, *United States* v. *Swift & Co., supra; Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

[9] The statement in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265, upon which taxpayer relies (Pet. 8), was merely a passing observation upon an uncontroverted portion of the case. See the *Gans* case, *supra*, p. 957, in which this Court's statement was referred to as "dictum." And in any event, the *Bertelsen & Petersen Co.* case, *supra*, overruled the "dictum."

upon the taxpayer's claims for refund. The scheme of orderly tax collection, envisaged by Section 3226 of the Revised Statutes, requires that, once there has been definitive action by the Commissioner, as there was in the instant case, the dissatisfied taxpayer be required to take timely action. To accept the taxpayer's contentions in the instant case would be to defeat the purposes of this section, to abolish any period of limitations in cases like the present, and to permit the litigation of claims which have long since become stale.

3. In the instant case the courts below took judicial notice of the established and uncontroverted (and stipulated) facts, appearing in their own records in the two tax suits of taxpayer for recovery of its 1917 tax attempted to have been collected by credits from 1918 and 1919, that the Commisioner signed the schedule of refunds and credits (making the credits and rejecting and disallowing the claims for refund for 1918 and 1919) on May 6, 1924. This action was proper.[10] See *Dimmick* v. *Tomp-*

[10] Taxpayer's suggestion (Br. 9) that the trial court and the circuit court of appeals erred in holding taxpayer's claims for refund for 1918 and 1919 disallowed in 1924, for the reason that at the trial the taxpayer "expects to produce the Commissioner of Internal Revenue to testify that he had no intention of disallowing the claim by the credit but intended to allow and pay it" does not require a contrary result, since the making of the credit constituted, as a matter of law, a refusal by the Commissioner to pay such 1918 and 1919 taxes and a disallowance of the taxpayer's claims for refund. See *United States* v. *Bertelsen & Petersen Co.*, *supra*; *Gans S. S. Line* v. *United States*, *supra*; *John F. Jelke Co.* v. *Smietanka*, *supra*.

kins, 194 U. S. 540, 548; *Alexander* v. *Hillman*, 296 U. S. 222, 231; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336–337. See also *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Kithcart* v. *Metropolitan Life Ins. Co.*, 88 F. (2d) 407, 411 (C. C. A. 8); *Kelly* v. *Johnston*, 111 F. (2d) 613, 615 (C. C. A. 9); *Booth* v. *Fletcher*, 101 F. (2d) 676, 679, fn. 2 (App. D. C.). On a motion to dismiss, a court need not accept as true allegations of fact which it will judicially notice to be otherwise than as alleged. *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *Southern Pac. R. Co.* v. *Groeck*, 68 Fed. 609 (C. C. S. D. Calif. 1895).

CONCLUSION

The district court was without jurisdiction to entertain taxpayer's action and the suit was therefore properly dismised. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
WARREN F. WATTLES,
Special Assistants t othe Attorney General.
RICHARD S. SALANT,
Attorney.

OCTOBER 1941.